(20) (A)

Nos. 91-261 and 91-274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
Petitioner,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,
Respondents.

MASSACHUSETTS WATER RESOURCES AUTHORITY, *et al.*,
Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF AMICI CURIAE OF THE MERIT SHOP FOUNDATION, REPRESENTATIVE BILL PAXON, AND CERTAIN OTHER MEMBERS OF THE UNITED STATES CONGRESS IN SUPPORT OF RESPONDENTS

(Additional Amici Representatives Listed on Inside Cover)

BRUCE J. ENNIS, JR.*
KENNETH R. DOLIN
JEFFERSON C. GLASSIE
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000
Attorneys for Amici Curiae
* Counsel of Record

September 8, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ADDITIONAL AMICI REPRESENTATIVES OF CONGRESS

RICHARD K. ARMEY
CASS BALLENGER
JOE BARTON
TOM DeLAY
WILLIAM L. DICKINSON
JOHN DOOLITTLE
ROBERT K. DORNAN
HARRIS W. FAWELL
WAYNE GILCHREST
JIM LIGHTFOOT
BOB LIVINGSTON
DICK NICHOLS
JIM SAXTON
DON SUNDQUIST
BARBARA VUCANOVICH
ROBERT S. WALKER
JOHN J. DUNCAN, JR.
MELTON D. HANCOCK
THOMAS E. PETRI
FRANK RIGGS
DOUG BEREUTER
THOMAS J. BLILEY, JR.
ANDY IRELAND
JIM RAMSTAD
CLIFF STEARNS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Nos. 91-261 and 91-274

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, *Petitioner*,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*, *Respondents.*

MASSACHUSETTS WATER RESOURCES AUTHORITY, *et al.*, *Petitioners*,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*, *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICI CURIAE OF THE MERIT SHOP FOUNDATION AND CERTAIN MEMBERS OF CONGRESS, REPRESENTATIVES BILL PAXON, RICHARD K. ARMEY, CASS BALLENGER, JOE BARTON, TOM DeLAY, WILLIAM L. DICKINSON, JOHN DOOLITTLE, ROBERT K. DORNAN, HARRIS W. FAWELL, WAYNE GILCHREST, JIM LIGHTFOOT, BOB LIVINGSTON, DICK NICHOLS, JIM SAXTON, DON SUNDQUIST, BARBARA VUCANOVICH, ROBERT S. WALKER, JOHN J. DUNCAN, JR., MELTON D. HANCOCK, THOMAS E. PETRI, FRANK RIGGS, DOUG BEREUTER, THOMAS J. BLILEY, JR., ANDY IRELAND, JIM RAMSTAD, AND CLIFF STEARNS, IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

Amici curiae are the Merit Shop Foundation (the "Foundation") and concerned Members of Congress,[1] who are dedicated to maintaining the fundamental policies of the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.*, as adopted by Congress, protecting those policies of free enterprise from impermissible interference by state governments, and ensuring the integrity of the statutory construction of the Act. The Foundation and these Members of Congress are committed to ensuring that the bidding process for construction projects funded by tax dollars remains open, competitive, and available to "merit shop" contractors. The individual Members of Congress supporting this brief amici curiae are: Representatives Bill Paxon, Richard K. Armey, Cass Ballenger, Joe Barton, Tom DeLay, William L. Dickinson, John Doolittle, Robert K. Dornan, Harris W. Fawell, Wayne Gilchrest, Jim Lightfoot, Bob Livingston, Dick Nichols, Jim Saxton, Don Sundquist, Barbara Vucanovich, Robert S. Walker, John J. Duncan, Jr., Melton D. Hancock, Thomas E. Petri, Frank Riggs, Doug Bereuter, Thomas J. Bliley, Jr., Andy Ireland, Jim Ramstad, and Cliff Stearns.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Foundation and the Members of Congress submitting this brief strongly support respondents' arguments, which are consistent with the central congressional policies underlying the Act. Therefore, the decision of the First Circuit in *Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. v. Massachusetts Water Resources Auth.*, 935 F.2d 345 (1st Cir. 1991), should be affirmed.

Preemption under the Act is clearly appropriate in this context under well-established precedent, both because

[1] The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

the activities of the Massachusetts Water Resources Authority ("MWRA") trample basic rights of employees under Section 7 of the Act and because the WMRA as a state entity has grossly intruded into the collective bargaining process protected by the Act. Although Congress has, within a narrow exception in the limited circumstance of the construction industry, permitted private employers to voluntarily enter into "pre-hire," or "project," agreements mandating union participation, Congress has not permitted government, be it a state or the National Labor Relations Board (the "Board"), to require that private employers enter into such agreements. Principles of fairness, openness, and free enterprise demand that, in particular, projects supported by public funds not be closed to the gamut of private employers, as has been done in the Boston Harbor matter by MWRA. The public interest requires the most cost efficient and effective use of government funds.

ARGUMENT

I. CONGRESS INTENDED TO DEFINE THE SCOPE OF FEDERAL LABOR LAW AND NOT ALLOW THE STATES TO UNDULY INTERFERE WITH ESSENTIAL WORKERS' RIGHTS AS THE MWRA HAS DONE.

Elemental policies of the Act, found in the congressional findings and declaration of policy, are to encourage the "practice and procedure of collective bargaining" and to "protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing. . . ." 29 U.S.C. § 151. These basic rights of employees to bargain collectively and to organize, as well as to *refrain* from doing so, are protected by Section 7 of the Act and have been since Congress adopted the Act more than fifty years ago;[2]

[2] "The [Act] requires an employer and a union to bargain in good faith, but it does not require them to reach agreement. § 8(d), as amended, 29 U.S.C. § 158(d) (duty to bargain in good faith

Congress did not intend that individual employees' rights be easily overcome.

Among the requirements imposed here by the MWRA are those that unilaterally appoint petitioner Building and Construction Trades Council ("Trades Council") as the designated collective bargaining agent for all craft employees working on the Boston Harbor project and mandate that all employees become union members within seven days of the start of their employment. A state entity such as MWRA is simply not permitted to contravene the collective bargaining process under the Act and interfere with workers' rights as MWRA has done here. The reason, of course, is not that the MWRA is subject to the Act's proscriptions; the Act clearly is not intended to apply to States.[3] Rather, Congress intended to preempt State's efforts to interfere in the collective bargaining process or with the protected rights of employees accorded under the Act. Preemption of such action traditionally has been based on States' attempted regulation of activities protected under Section 7 or regulated as an unfair labor practice under Section 8 of the Act, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959), or on congressional intent simply to leave certain areas unregulated, *Lodge 76, Int'l Ass'n. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n.*, 427 U.S. 132, 140 (1976).[4]

"does not compel either party to agree to a proposal or require the making of a concession")." *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 616 (1986) [*Golden State I*].

[3] The Act applies to "employers," defined specifically to exclude "any State or any political subdivision thereof. . . ." 29 U.S.C. § 152(2).

[4] " '[T]he congressional intent in enacting the comprehensive federal law of labor relations' required that certain types of peaceful conduct 'must be free of regulation.' . . . The *Machinists* rule creates a free zone from which all regulation, 'whether federal or state,' . . . is excluded. . . . The *Machinists* rule is not designed, as is the *Garmon* rule, to answer the question whether state or federal

In reaching its decision that the activities of the MWRA were preempted, the First Circuit focused on the latter *Machinists* rule. In particular, the Court of Appeals relied on this Court's decisions in the *Golden State* cases, which hold that *Machinists* preemption prevents regulation, either by a State or the federal government, of aspects of labor-management relations left unregulated by the Act. 493 U.S. at 112-113. In *Golden State I*, this Court held that the City of Los Angeles' action in conditioning renewal of an employer's operating franchise on settlement of a labor dispute was preempted by the Act, because it "entered into the substantive aspects of the bargaining process to an extent Congress has not countenanced." 475 U.S. at 615-616 (citations omitted). In *Golden State II*, this Court reaffirmed that state interests must be subordinate to the basic principle of free collective bargaining.

The State's action here must be preempted, because it even more directly interferes with central concerns of the Act than the City of Los Angeles' action in *Golden State*. The City of Los Angeles' intrusion into the collective bargaining process in *Golden State* merely attempted to regulate the employee's use of one of its economic weapons, the right to strike. As a state entity, MWRA's intrusion here actually requires that an agreement be reached and then mandates what its terms will be. Indeed, as the Court of Appeals concluded, the state's intrusion here "for all intents and purposes . . . *eliminates* the bargaining process altogether." 935 F.2d at 353. MWRA, by directly infringing affected workers' central rights of self-organization and designating representatives of their own choosing, has taken action that the Congress intended to leave free from state regulation.

---

regulations should apply to certain conduct. Rather, it is more akin to a rule that denies either sovereign the authority to abridge a personal liberty." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111-112 (1989) [*Golden State II*] (quoting *Machinists*, 427 U.S. at 153, 155).

II. CONGRESS DID NOT INTEND THE ACT TO AUTHORIZE STATES TO ENTER INTO PROJECT LABOR AGREEMENTS.

Under limited exceptions to the Act, Congress has permitted "employers" in the construction industry to take certain actions that would otherwise be illegal, such as enter into project agreements establishing labor terms and union recognition for all contractors and subcontractors working on a project. The fact that private employers may take such actions is irrelevant to the preemption issue here. It is *not* the legality of the project agreement that is in dispute; rather, what is contested is the legality of the state requirement imposed by MWRA establishing recognition of a union and signing of a master labor agreement as a condition of awarding a government project bid.

To the contrary, Congress clearly distinguishes between States and private parties. Sections 8(e) and 8(f) refer only to "employers" and Section 2(2) of the Act makes clear that "employer" "shall not include . . . any State or political subdivision thereof." Thus, the plain language of Sections 8(e) and (f) underscores Congress' intent to cover private employers only. As the Court of Appeals concluded, "the silence as to permitted state regulation is deafening." 935 F.2d at 357. Because States are expressly excluded from these limited exceptions for the construction industry, petitioner cannot plausibly argue that it may take advantage of the exceptions and implement project agreements, particularly in the face of the *Machinists* preemption doctrine.

Congress obviously meant to treat state and private entities differently in these matters. Indeed, this Court has previously emphasized the state/private distinction: "The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role

to play." *Wisconsin Dept. of Indus., Labor and Human Relations v. Gould*, 475 U.S. 282, 290 (1986).

The *Golden State* cases further highlight this differentiation. The city's conduct there, in conditioning renewal of a transportation carrier's franchise on settlement of a labor dispute by a specific date, admittedly would have been permissible if done by a private purchaser of that carrier's services. This Court nevertheless held that the city's action in this regard constituted *governmental* interference with collective bargaining and was, therefore, preempted by the Act. Inasmuch as the MWRA is an arm of the state, the Court of Appeals—based on this Court's holdings in *Gould* and *Golden State I*—rightly concluded that "the private employer comparison merits little weight." 935 F.2d at 358.

Finally, it must be observed that allowing States to enter into labor agreements requiring all union labor could effectively dismantle the scheme of the Act as carefully adopted by Congress. As pointed out by the Court of Appeals, allowing States to regulate in this reserved area would amount to "totally displacing" the Act. *Id.* at 355.

III. THE STATE REGULATION AT ISSUE THREATENS THE FAIR USE OF FEDERAL FUNDS FOR GOVERNMENT CONSTRUCTION PROJECTS.

The state regulation in this case seeks to deny open shop contractors the right to bid on government projects, such as the Boston Harbor Project, unless they are willing to waive their right to negotiate their own labor agreements and force their employees to be organized and represented by a representative not of their own choosing. Such governmental action may significantly reduce competitiveness in the bidding process for government projects funded by public tax dollars. This anti-competitive result could lead to more public money being needed to fund government construction projects, an unnecessary luxury that simply cannot be afforded in these economic

times. Further, it is simply not fair to a non-union employer or employee to allow this type of roadblock constructed by the MWRA to effectively prevent them from participating in the project. The amici Members of Congress, as keepers of the public trust, are deeply troubled by this disregard for the fair use of taxpayers' funds and urge that MWRA's action be halted so that merit shop contractors are not effectively precluded from working on public projects.

CONCLUSION

The Judgment of the First Circuit Court of Appeals should be affirmed and the action of the MWRA declared to be preempted by the National Labor Relations Act.

Respectfully submitted,

BRUCE J. ENNIS, JR.*
KENNETH R. DOLIN
JEFFERSON C. GLASSIE
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000
Attorneys for Amici Curiae

September 8, 1992

* Counsel of Record